

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1972

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1972

UNITED STATES OF AMERICA,

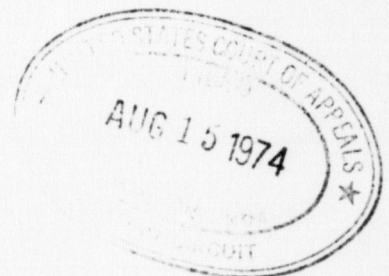
Appellee,

-against-

VITO DIBARTOLO,

Defendant-Appellant.

On Appeal from the United States District
Court for the Eastern District of New York



APPENDIX TO BRIEF FOR APPELLANT

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Of Counsel

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1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

4 -----x

5 UNITED STATES OF AMERICA :

6 -against- :

71 CR 1364

7 VITO DIBARTOLO, :

8 Defendant. :

9 -----x

10
11 United States Courthouse
12 Brooklyn, New York

13 February 11, 1974
14 10:00 a.m.

15 B e f o r e :

16 HONORABLE JOHN F. DOOLING, JR., U.S.D.J.
17
18
19
20
21
22

23 HENRI LeGENDRE
24 COURT REPORTER
25

Appearances:

EDWARD J. BOYD V, ESQ.
United States Attorney
for the Eastern District of New York

BY: JOAN O'BRIEN, ESQ.
Assistant United States Attorney

V. TOMASELLI, ESQ.
Attorney for Defendant

- - -

1 THE CLERK: U.S.A. vs. Vito Dibartolo. 3

2 MR. TOMASELLI: The defendant is prepared to
3 plead guilty to the seventh count of the indictment.

4 THE COURT: Count Seven?

5 MR. TOMASELLI: He's withdrawing the plea of
6 not guilty heretofore entered and he is pleading guilty
7 to one count of the indictment and this is to cover
8 all the other counts in the indictment.

9 MRS. O'BRIEN: That's correct.

10 THE COURT: Before I accept Mr. Dibartolo's
11 plea of guilty to Count Seven, I want to make sure
12 Mr. Dibartolo that you understand the nature of the
13 charge and the consequences of your pleading guilty
14 to it.

15 Now, the charge in Count Seven is that on or
16 about the 27th day of March, 1970, within the Eastern
17 District of New York you unlawfully had in your
18 possession a United States Treasury check No. 8708634,
19 addressed to Daniel Carponeta, 839 269th Street,
20 New Hyde Park, New York 11040, which was the contents
21 of a letter stolen from the U.S. Mail, you knowing it
22 to have been stolen.

23 Now, do you understand the charge and what
24 they are talking about; that you had this check in
25 your hand and that you knew that it was a mailed check,

1 a check that had been mailed to him and that it was
2 stolen; do you understand that?

3 MR. DIBARTOLO: I understand what you say. I
4 don't say I stole it or not.

5 THE COURT: Did you have that check, that's
6 what we are talking about; what they charge is that you
7 had the check.

8 MR. TOMASELLI: His interpretation is as
9 follows. He had the check in his possession. I just
10 reiterated it in Italian what the situation was. He
11 said he had the check in his possession. He knew the
12 check wasn't 100 percent good. This is his words to
13 me -- however, he did not actually know that it was
14 stolen. In other words, he didn't see anybody steal
15 it but he knew that the check was not a bona fide
16 check.

17 THE COURT: You knew that the man who gave it
18 to you wasn't Mr. Carponeta?

19 MR. TOMASELLI: Tell the Judge.

20 MR. DIBARTOLO: Yes.

21 THE COURT: And you strongly suspected that it
22 had been stolen?

23 MR. DIBARTOLO: Yes, I know it was something.

24 THE COURT: In other words, the circumstances
25 in which you received the check made you understand

1 that something was wrong with it?

2 MR. TOMASELLI: He says the individual brought
3 it in, didn't tell him but he understood there was
4 something wrong with the check.

5 THE COURT: You could tell from what he wanted
6 for it, right?

7 MR. DIBARTOLO: Yes.

8 THE COURT: In other words, he didn't expect to
9 get from you the whole face amount of the check?

10 MR. TOMASELLI: He said he told the individual
11 he couldn't give him all the money. He gave him a
12 portion, that he left and he knew he wouldn't be back.

13 THE COURT: All right. I think that's enough
14 to convince a jury that you knew it was stolen.

15 Now, if you stand on your plea of not guilty
16 to this and all the other charges, you are entitled to
17 a jury trial, a trial by 12 impartial jurors. Do you
18 understand that?

19 MR. DIBARTOLO: Yes.

20 THE COURT: Now, at any such trial, you have the
21 right to be represented by a lawyer, an advocate. Do
22 you understand that.

23 MR. DIBARTOLO: Yes.

24 THE COURT: And if you can't afford a lawyer
25 or cannot any longer afford to pay a lawyer, then you

1 tell the Court and the Court will appoint a lawyer
2 to represent you without cost to you; do you understand
3 that?

4 MR. DIBARTOLO: Yes.

5 THE COURT: Now, if you go to trial then the
6 Government, United States Attorney here must call into
7 court the witnesses that the Government relies on to
8 prove the case against you. Do you understand that?

9 MR. DIBARTOLO: Yes.

10 THE COURT: And this all happens in the presence
11 of the jury, so if they try to lie you will be here
12 with a lawyer to cross-examine them and to face them
13 down. Do you understand that?

14 MR. DIBARTOLO: Yes.

15 THE COURT: Now, if you want to go to trial
16 then you can have the Court issue subpoenas to make
17 the people whom you want to call as witnesses on your
18 side of the case come into court so that you can make
19 them testify on your side of the case. Do you under-
20 stand that?

21 MR. DIBARTOLO: Yes.

22 THE COURT: If you go to trial then the Court
23 instructs the jury that it cannot convict you unless
24 it is satisfied of your guilt beyond a reasonable
25 doubt. Do you understand that?

1 MR. DIBARTOLO: Yes.

2 THE COURT: Now, if you go to trial you can
3 take the witness stand if you want to and explain
4 your side of the case. You can also stay off the
5 witness stand under your Fifth Amendment rights and
6 decline to answer any questions at all; and if you
7 decide that you don't want to testify, then you have
8 the right to have the Court tell the jury that they
9 cannot use your failure to testify as evidence that
10 you did it, that they can't draw any inference for
11 your failing to take the stand. Do you understand
12 that?

13 MR. DIBARTOLO: Yes.

14 THE COURT: Now, if you plead guilty to Count
15 Seven then you cannot take an appeal from the sentence
16 that's imposed on Count Seven, it's just as if you
17 had gone to trial on Count Seven and lost and appealed
18 and lost the appeal; do you understand that?

19 MR. DIBARTOLO: Excuse me. One question.

20 MR. TOMASELLI: He understands that, Judge.

21 THE COURT: Now, if you plead guilty to Count
22 Seven, then you are exposed to having the maximum
23 penalty provided by law imposed on you for that
24 offense which is a fine of not more than \$2,000 or
25 imprisonment for not more than five years or both.

1 Do you understand that?

2 MR. DIBARTOLO: Excuse me.

3 (Lawyer explaining to witness.)

4 MR. DIBARTOLO: Yes.

5 THE COURT: Now, has anybody made any threats
6 against you in order to get you to plead guilty to
7 Count Seven?

8 MR. DIBARTOLO: No.

9 THE COURT: Has anyone put any pressure on you
10 to make you plead guilty?

11 MR. DIBARTOLO: No.

12 THE COURT: Now, has there been any understand-
13 ing at all about what will happen if you do plead guilty
14 other than the agreement just made here this morning
15 between Miss O'Brien and Mr. Tomaselli that on sentence
16 day the Government will move to dismiss all the other
17 counts of the indictment, so that you have only Count
18 Seven and your plea of guilty on that and your sentence
19 on Count Seven; is that right?

20 MR. DIBARTOLO: Yes.

21 THE COURT: No other arrangements of any kind?

22 MR. DIBARTOLO: No.

23 THE COURT: Nobody has made any promises to
24 you about sentence or predictions about what sentence
25 you are likely to get?

1 MR. DIBARTOLO: No, sir.

2 THE COURT: I think we did go into the question
3 as to whether you did or did not get involved with
4 this check and we are, as I understand it, agreed that
5 you did get this check from a man other than Mr.
6 Carponeta.

7 MR. DIBARTOLO: Excuse me?

8 THE COURT: You got the check from a person
9 whom you knew was not Daniel Carponeta?

10 MR. DIBARTOLO: Yes, because he left the check
11 and not all the money given to him.

12 THE COURT: And that you got from him by giving
13 him only part of what the check said it was for?

14 MR. DIBARTOLO: Supposed to come back, the man
15 never showed up for the rest.

16 THE COURT: You knew he wasn't going to come
17 back; is that right?

18 MR. DIBARTOLO: Say come back, never come back.

19 THE COURT: And then you put the check through?

20 MR. DIBARTOLO: Yes.

21 THE COURT: The plea of guilty on Count Seven is
22 entered.

23 MISS O'BRIEN: Thank you, your Honor.

24 The defendant is presently released on a

25 \$5,000 --

1 THE COURT: Personal --

2 MR. TOMASELLI: \$500 cash.

3 THE COURT: With a 10 percent deposit.

4 MR. TOMASELLI: 600 actually because he had --

5 THE COURT: Is that all right?

6 MISS O'BRIEN: No objection to that continuing.

7 THE COURT: That bail arrangement will be
8 continued.

9 MISS O'BRIEN: Thank you, your Honor.

10 (Whereupon the case was concluded.)

11 * * *

A-11

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK
4 -----x

5 UNITED STATES OF AMERICA :

6 -against- :

7 VITO JACK DIBARTOLO : 71 CR 1364

8 Defendant :
9 -----x

10
11 United States Courthouse
12 Brooklyn, New York

13 June 14, 1974
14 2:00 p.m.

15 B e f o r e

16 HONORABLE JOHN F. DOOLING, JR.

17 U. S. D. J.
18
19
20
21
22
23

24 SHELDON SILVERMAN
25 Acting Official Court Reporter

A-12

2

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: THOMAS PATTISON, Esq.
Assistant U.S. Attorney

WILLIAM SONENSHINE, Esq.
Attorney for Defendant

1 MR. PATTISON: Your Honor, good afternoon.

2 THE COURT: Yes, sir?

3 MR. SONENSHINE: Good afternoon, your Honor.

4 THE COURT: Where is your friend?

5 MR. SONENSHINE: As of this moment, Judge,

6 I have not yet seen him. I was expecting to see
7 him. I called my office to find out if they heard
8 from him because on the premise he's probably
9 coming from upstate New York, something may have
10 occurred and perhaps might have informed my of-
11 fice, but as of about five or ten minutes ago,
12 they haven't heard from him, your Honor.

13 THE COURT: Is there any reason why we
14 can't go ahead with the testimony of this part
15 of the hearing? This is not the trial.

16 MR. SONENSHINE: I would be prepared to
17 waive his presence.

18 THE COURT: I don't think it's essential.

19 MR. PATTISON: We would be prepared to
20 waive his presence. The actual history of the
21 actual case indicates that he is not averse to
22 making allegations concerning prior lawyers and
23 I think that unless he could somehow indicate --

24 THE COURT: He's going to be here as a
25 witness sooner or later. Don't worry.

1 MR. PATTISON: I would ask that a warrant
2 be issued now for him.

3 THE COURT: Let's see if he appears before
4 we complete such testimony as we can usefully
5 take today.

6 MR. PATTISON: Very well, your Honor.

7 Your Honor, it's my understanding of the
8 nature of the case here, motion, as it is, that
9 the burden of proof shall be borne by him.

10 THE COURT: No question about that.
11 I don't believe Mr. Sonenshine has either. Have
12 you?

13 MR. SONENSHINE: I beg your pardon?

14 THE COURT: You have no question about the
15 the correctness of it?

16 MR. SONENSHINE: The burden of proof being
17 on me?

18 THE COURT: Yes.

19 MR. SONENSHINE: No, your Honor.

20 MR. PATTISON: Accordingly, if you would
21 wish to call Mr. Tomaselli, he's here as a witness
22 for you.

23 MR. SONENSHINE: I have no objection to
24 calling him at all. In fact, I would call him
25 but I'm a little concerned, your Honor, that

1 perhaps we should allow a little more time before
2 beginning, in case the defendant does get here
3 shortly. I would much prefer he be present
4 rather than not.

5 THE COURT: I have another matter at 4:30.

6 MR. PATTISON: I say I believe the only
7 factual issue here is what Mr. Sonenshine's client
8 knew or did not know at the time of the actual
9 plea. I think to the extent that Mr. Tomaselli
10 translated parts of what was said at that time --
11 I believe that if we could agree that he did
12 translate accurately, that would finish the bulk
13 of what he would have to say and the only relevant
14 issue then would be what Mr. DiBartolo's
15 understanding was, which I feel the only way we
16 can test that is to have him here.

17 THE COURT: We can't have two people on
18 the witness stand at the same time and I do not
19 propose to sit around and wait forever for
20 Mr. DiBartolo. He had more than ample notice the
21 hearing was going to take place today. Counsel
22 are here.

23 MR. PATTISON: I agree.

24 THE COURT: Others are in the courtroom.
25 Why the prime actor can't be here escapes me.

1 MR. SONENSHINE: If your Honor wishes me
2 to proceed, I will.

3 THE COURT: Yes, sir.

4 MR. SONENSHINE: I'll call Mr. Tomaselli,
5 if the Court please.

6
7 V I N C E N T T O M A S E L L I, called as a witness,
8 having been duly sworn by the Court, testified
9 as follows:

10 THE COURT: Give your full name to the
11 reporter.

12 THE WITNESS: Vincent Tomaselli.

13 DIRECT EXAMINATION

14 BY MR. SONENSHINE:

15 Q Would you state your occupation?

16 A I'm an attorney.

17 Q Have you, prior to this day, represented
18 a man by the name of Vito DiBartolo?

19 A Yes, I have.

20 Q Have you represented him in this court in
21 connection with Indictment No. 71-CR-1364?

22 A Yes, I have.

23 Q More specifically, did you represent him
24 in this court before Judge Dooling on February 11th,
25 1974, at which time he entered a plea of guilty to

Count 7 of the indictment previously referred to?

A Yes, I have.

Q Did you on that day speak with Mr. Di-Bartolo?

A Yes, I did.

Q Did you speak to him in the Italian language?

A Sicilian dialect, yes.

THE COURT: What is that?

THE WITNESS: Sicilian dialect of the Italian language.

Q In the course of your speaking to him, were there times when you spoke to him in the Sicilian dialect and he indicated to you that he did not entirely understand what you were saying?

A Not in words, but he would ask me to repeat certain things. He never said he did not understand what I was saying, but he would ask me to repeat certain phrases which I had indicated to him.

Q In speaking to him, did you at any time--
Withdrawn.

In speaking to him, did you gather from him that the dialect he spoke was not quite the same dialect that you spoke to him?

Tomaselli-direct

1
2 A No.

3 THE COURT: No?

4 THE WITNESS: No, it was the same dialect.

5 Q Let me put it more specifically. Were
6 there times that certain words that you used in speaking
7 to him were words which he indicated to you might not
8 have been understood by him in the manner that you
9 wanted him to understand it?

10 MR. PATTISON: I object.

11 A Possibly.

12 THE COURT: No, he may answer.

13 A (Continuing) Possibly, yes.

14 THE COURT: Can you illustrate that?

15 THE WITNESS: Well, what I believe counsel
16 is asking me is that when he would speak to me
17 in the Sicilian dialect and I would interpret
18 into English what he had indicated to me, whether
19 I could interpret exactly the way he -- the words
20 he spoke -- I would have to say no, I could not
21 interpret exactly the words he spoke, but I would
22 interpret the general phrase that he indicated.

23 In other words, there are certain words
24 that are almost impossible to interpret from the
25 Sicilian into the English language word for word.

1
2 You would have to use a phrase to inter-
3 pret perhaps one word that he had spoken from
4 Sicilian to English.

5 THE COURT: How would that have come to
6 the notice of Mr. DiBartolo?

7 THE WITNESS: I'm sorry, Judge, I don't
8 understand.

9 THE COURT: How would DiBartolo recognize
10 that as a problem?

11 THE WITNESS: I don't know that he did.

12 THE COURT: I think the question that
13 Mr. Sonenshine asked was, Was it ever made clear
14 between you and DiBartolo that you and he were
15 using the same Sicilian dialectical word in a
16 different sense? Was that your question?

17 MR. SONENSHINE: Yes, at times the words
18 might have had more than one variation of meaning.

19 THE WITNESS: I'm sorry, but I just don't
20 understand this particular question.

21 THE COURT: For example, "ladrone" might
22 mean thief to one man and banker to another.

23 THE WITNESS: Words were not different.

24 THE COURT: You found no occasion on which
25 you realized or he said that you must be using

1
2 the same Italian word, Sicilian word, in dif-
3 ferent senses?

4 THE WITNESS: No, the only thing which
5 I'm trying to explain is that if he had indicated
6 a certain phrase in Sicilian which would be very
7 difficult to interpret word for word into
8 English, but I interpreted to give the general
9 interpretation of that particular word or phrase
10 in English, not using identical words that he
11 used in Sicilian.

12 Q Let me ask you this, page 9 of the minutes
13 of plea taken on February 11, 1974.

14 MR. PATTISON: Might not the witness see
15 a copy of it if there are going to be questions
16 about it?

17 Q Page 5 of the defendant's affidavit con-
18 tains the quotation I'm referring to --

19 THE COURT: Page 9?

20 MR. SONENSHINE: Page 5 of the affidavit
21 in which I quote page 9 of the minutes.

22 Q Do you see, Mr. Tomaselli, the following
23 question by the Court and the following answer by the
24 defendant quoted there as follows -- I'm reading now
25 from page 9 of the plea minutes:

1
2 "THE COURT: You knew he wasn't going to
3 come back; is that right?"

4 THE COURT: Where is that?

5 MR. SONENSHINE: Page 9 of the plea minutes,
6 a little below the middle of the page, your Honor.

7 THE COURT: I have it.

8 Q Question on page 9:

9 "THE COURT: You knew he wasn't going to
10 come back; is that right?

11 "MR. DiBARTOLO: Say come back; never
12 come back."

13 Do you see that, sir?

14 A Yes, I do.

15 Q Is that in accordance with what you under-
16 stood the defendant to have been saying to you prior to
17 that?

18 A Yes.

19 Q Now --

20 A Wait a minute. He had never said that to
21 me in Sicilian. He had only said that to the Court.

22 Q I understand that. Now, I ask you to di-
23 rect your attention to page 4 of the same plea minutes.
24 You won't have that there unless I locate it for you.

25 MR. SONENSHINE: It happens to be page 4

1 of the affidavit, also, your Honor.

2 Q Would you examine page 4 of the defendant's
3 affidavit here and I direct your attention to that quo-
4 tation from page 4 of the plea minutes.
5

6 A Yes, sir?

7 Q I'm sorry, page 5 of the plea minutes.
8 Near the top of the page:

9 "THE COURT: In other words, he didn't
10 expect to get from you the whole face amount of
11 the check?

12 "MR. TOMASELLI: He said he told the
13 individual he couldn't give him"--

14 THE COURT: Wait a minute. Where is that?

15 MR. SONENSHINE: Page 5 of the plea
16 minutes, beginning on line 8.

17 Suppose I re-read the entire question by
18 the Court and the answer by Mr. Tomaselli.

19 "THE COURT: In other words, he didn't
20 expect to get from you the whole face amount of
21 the check?

22 "MR. TOMASELLI: He said he told the
23 individual he couldn't give him all the money.
24 He gave him a portion, that he left and he knew
25 he wouldn't be back."

1
2 Did you notice that, sir, quoted there?

3 A Yes.

4 Q May I ask you this. I take it this answer
5 that you gave Judge Dooling was predicated upon a conver-
6 sation you had with the defendant in which each of you
7 spoke the Sicilian dialect?

8 A That's correct.

9 Q Now, when you answered Judge Dooling on
10 behalf of Mr. DiBartolo, that Mr. DiBartolo said he knew
11 the man wouldn't be back, did Mr. DiBartolo indicate to
12 you as to which stage of time he learned or knew or
13 concluded that the man who gave him the check wouldn't
14 be back?

15 A No.

16 Q So that when you told Judge Dooling that
17 the defendant said he knew he wouldnt be back, you
18 didn't know whether he learned that fact prior to ac-
19 cepting the check or at the time of accepting the check
20 or sometime thereafter?

21 A That's correct.

22 Q Now, would you say that the defendant's
23 answer --

24 THE COURT: Wait a minute.

25 MR. SONENSHINE: I'm sorry, Judge. Am

1
2 I going too fast?

3 THE COURT: Yes, I understand.

4 MR. SONENSHINE: Then I'll slow down.

5 THE COURT: Do you mean to say that you
6 knew why I asked the question?

7 THE WITNESS: Yes, I did.

8 THE COURT: And when you gave the answer
9 "Yes," to me, what did you intend me to under-
10 stand?

11 THE WITNESS: I intended you to understand
12 what the defendant was telling me at that parti-
13 cular time.

14 THE COURT: All you said after your talk
15 with him was to say "Yes"?

16 He said he told the individual he couldn't
17 give him all the money, he gave him a portion,
18 that he left, and he knew he wouldn't be back.

19 What did you intend me to understand by
20 that?

21 THE WITNESS: That's exactly what he said.

22 THE COURT: And that's exactly what he
23 said to you at that time?

24 THE WITNESS: Yes, it is.

25 THE COURT: I won't ask you to try to

1
2 rehearse to yourself the Sicilian words that he
3 used.

4 THE WITNESS: I know what he said. If you
5 want me to repeat it in Sicilian.

6 THE COURT: I don't know that the court
7 reporter knows the Sicilian dialect well enough
8 to take it down.

9 Can you spell it?

10 THE WITNESS: Phonetically, perhaps.

11 THE COURT: It's not a written dialect.

12 THE WITNESS: I have never seen it written.
13 I've only heard it spoken and I speak it.
14 I don't think there's a written dialect. The
15 written Italian is the uniform Italian which is
16 taught in school and the dialect is perhaps
17 what you'd call a peasant language.

18 Q Forgive me for digressing for a moment.
19 What happens when someone speaks Sicilian, in writing,
20 what do they say what they want to say orally?

21 A They write it in Italian. They don't
22 write -- they then write Italian.

23 THE COURT: They then write what they're
24 taught in school?

25 THE WITNESS: Correct.

1
2 Q At all events, when you had indicated to
3 the Court that your understanding was that the defendant
4 had said to you that he knew the man who gave him the
5 check wouldn't be back, I take it you understood that
6 he meant that somewhere in the course of this transaction,
7 whether it be simultaneously with the receipt of the
8 check or what, so far as you understood, Mr. DiBartolo
9 was saying to you, "I got the check. I gave the man
10 part of the money. I knew he was not coming back."

11 A That's correct.

12 THE COURT: Now, did you understand from
13 him that he was reserving the idea that you may
14 have learned that later?

15 THE WITNESS: No.

16 THE COURT: You knew what the question was
17 all about?

18 THE WITNESS: That's correct.

19 THE COURT: That it had to do with whether
20 or not he had a felonious intention?

21 THE WITNESS: That's correct.

22 THE COURT: And that that felonious in-
23 tention would depend entirely on whether he was
24 felonious at the moment of his acquisition of
25 the check or whether he was victimized by being

1
2 given a bum check?

3 THE WITNESS: That's correct.

4 THE COURT: And you did not intend to
5 plead guilty if there was any possibility that
6 you could detect from your conversations with
7 him that he might have been the victim rather
8 than the felon?

9 THE WITNESS: That's correct.

10 Q May I ask you this, Mr. Tomaselli: If
11 Mr. DiBartolo were conveying to you the thought that
12 he concluded that the man wouldn't come back by virtue
13 of the fact he said he'd come back and didn't return for
14 some period of time, would there necessarily have been
15 any significant difference in the dialect or the use of
16 the words --

17 THE COURT: In the words chosen.

18 Q -- in the words chosen?

19 A Well, if he would have indicated to me
20 that he took the check and gave money, a portion of
21 money, and the individual did not come back --

22 THE COURT: And didn't come back for the
23 rest of his money.

24 THE WITNESS: Correct.

25 A (Continuing) He would state to me he didn't

1
2 come back, but what Mr. DiBartolo said was that he
3 believed. In other words, he said to me in Sicilian
4 that he took the check. He gave a portion of the money
5 because -- it's my belief is that he gave a portion of
6 the money to this individual and he did not state why he
7 gave him a portion of the money. He just stated he gave
8 a portion of the money which represented --

9 THE COURT: No. Read what you said.

10 That's not what you translated in the same --

11 THE WITNESS: He did not get the face
12 amount of the check.

13 THE COURT: That he couldn't give the guy.
14 In other words, that's what you say he told you
15 he told the individual.

16 THE WITNESS: But he didn't say the reason
17 why he couldn't. He just said he could not give
18 him all of the money and I don't know the reason
19 why he didn't give him all of the money, and the
20 next point is that as far as the individual not
21 coming back, he indicated to me that, in other
22 words, he believed that he would not be back.

23 THE COURT: He realized then that he very
24 likely would not be coming back?

25 THE WITNESS: That's what he said to me.

1
2 THE COURT: Because he knew he was not the
3 payee.

4 THE WITNESS: He said (Italian).

5 THE COURT: What?

6 THE WITNESS: He said to me "I believe
7 he would not come back." I don't know from what
8 point of time he's talking about. I don't know
9 if he's talking about now, and when you say,
10 "I believed" --

11 THE COURT: Let's get this perfectly plain.
12 This is one of eight counts.

13 THE WITNESS: That's correct.

14 THE COURT: You were pleading this man
15 guilty rather than face a trial.

16 THE WITNESS: That's correct.

17 THE COURT: If anything had come out in
18 the course of your discussions with him that
19 would have indicated to you that that was folly,
20 that he was an innocent victim of a man who had
21 ditched him with a bad check, you would not plead
22 him guilty.

23 THE WITNESS: That's correct.

24 THE COURT: Did he at any time say anything
25 to you that held out to you the hope that you

1
2 could beat this count?

3 THE WITNESS: No.

4 Q Did the defendant ever say to you that he
5 knew this check was stolen?

6 A No.

7 THE COURT: I knew that because I read
8 the Court of Appeals decision, possession of
9 recently stolen property.

10 MR. SONENSHINE: I don't know what the
11 recent possession aspect would have been.

12 THE COURT: It has a good deal to do with
13 it, I think.

14 MR. SONENSHINE: It may be.

15 Q At all events, would it have been a reason-
16 able possibility, looking back at the plea at this
17 point, that Mr. DiBartolo could have intended to convey
18 to you that he concluded the man wasn't coming back
19 when he didn't show up for the rest of the money as
20 opposed to having concluded that the man wasn't coming
21 back the minute he got the check? Could there have been
22 a language situation there in which it could have been
23 Mr. DiBartolo's intent to say what he said on page 9
24 "Say come back, never come back," as opposed to "I knew
25 he wasn't coming back the minute I took the check"?

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2 A As I said before, I can't determine from
3 what point of time he is speaking about, but the only
4 thing I can say is that there may be a possibility but
5 from what he spoke and how he spoke at the particular
6 time that we were taking the plea, it was my impression
7 that he indicated that the individual would not be back.

8 Q But he didn't say when he concluded that,
9 did he?

10 A No.

11 Q So that when you said to Judge Dooling that
12 "the defendant says he knew he would not come back," you
13 understood or you believed it to mean when he got the
14 check he knew the man wasn't coming back?

15 A That's correct.

16 Q Now I ask you, is what he said to you in
17 Italian consistent with his statement on page 9 in
18 response to the Court's question --

19 THE COURT: What page?

20 MR. SONENSHINE: Page 9 of the plea
21 minutes.

22 Q To refresh your recollection, Mr. Tomaselli
23 the question by the Court:

24 "THE COURT: You knew he wasn't going
25 to come back; is that correct?

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2 "MR. DiBARTOLO: Say come back; never come
3 back."

4 Is it consistent with Mr. DiBartolo's
5 statement that the man said he would come back and never
6 did?

7 MR. PATTISON: I object, your Honor,
8 characterization.

9 MR. SONENSHINE: I'm asking if the trans-
10 lation is consistent.

11 THE COURT: Overruled.

12 Q Is the statement made to you in the
13 Sicilian dialect, the subject of when he knew the man
14 wouldn't come back, is it as consistent that he could
15 have meant that he later concluded that since time went
16 by and the man didn't appear for the rest of his money,
17 he now concluded he wasn't coming back, is it as con-
18 sistent for him to have said that as it is for you to
19 conclude from what he said perhaps he thought, or you
20 thought he meant to say at the moment he acquired the
21 check?

22 In other words, could Mr. DiBartolo have
23 been saying to you in the Sicilian dialect, "I concluded
24 the man wasn't coming back because he didn't show," as
25 much as to say from the same words he used, that you

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thought he meant immediately?

A The words he spoke in English, "Say come back; but did not come back," he never spoke in Sicilian. As far as whatever statements he made in English, he made on his own. As far as the statements that he made with regard to what I interpreted it, it was as he said it. Now, I really don't know if he said in his own mind or he left out when he was speaking to me that the individual said he would come back, but he never said that to me. He only said that in English.

Q Is there anything about the statement on page 9, the words by Mr. DiBartolo in English, to Judge Deoling, "Say come back, never come back," is that in any way inconsistent with anything you ever heard him say before?

A That day?

Q At any time. Let me rephrase the question. You were standing alongside Mr. DiBartolo, were you not?

A Yes.

Q When he made the statement on page 9, "Say come back, never come back"?

A That's correct.

Q Now, you assumed that to mean, did you not, in English, that the man who said he would come

1
2 back, apparently promising to, in fact never did; isn't
3 that --

4 MR. PATTISON: Objection.

5 MR. SONENSHINE: I'll rephrase the
6 question, Judge.

7 Q When Mr. DiBartolo, standing next to you,
8 said, "Say come back; never come back," that didn't seem
9 factually inconsistent with anything you understood about
10 this case, did it?

11 A About the statement or about the case?
12 In other words, about that particular statement? That's
13 the first time I heard that statement.

14 Q I understood that. What I'm getting at
15 is you had previously told the Court in English --

16 THE COURT: I understand him and he under-
17 stands.

18 Q -- that Mr. DiBartolo said he knew the man
19 was not coming back?

20 THE COURT: What you say is here on page
21 nine, in Mr. Tomaselli's presence, DiBartolo
22 was in substance saying to me in answer to my
23 two questions to him that on the day when he got
24 the check, the transaction was conducted in
25 terms that the man was supposed to come back

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2 for the rest of his money, but that in fact the
3 man never did come back for the rest of his money
4 and that it is from that and that only that
5 Mr. DiBartolo inferred that he, the man, had
6 never intended to come back since he knew it was
7 a thief, of course, but does not indicate that
8 Mr. DiBartolo realized that until the failure
9 to come back occurred.

10 MR. SONENSHINE: That's right.

11 THE COURT: Now, did you spell that out
12 of what you heard him say on page 9?

13 THE WITNESS: No.

14 THE COURT: Neither did I.

15 I understood it as saying what it would
16 mean if it was said with the intonation, if we
17 looked first on line 14, "supposed to come back,
18 the man never showed up for the rest," where
19 it would be an ironical comment. The transac-
20 tion was conducted in terms of making believe
21 the man would come back, "but he never showed
22 up as I knew he wouldn't."

23 The same later on, 18, when I again asked,
24 "You knew he wasn't going to come back; is that
25 right?"

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2 "Say come back; never come back." That
3 is, he said he was coming back but I knew he was
4 never coming back.

5 MR. SONENSHINE: Your Honor, may I just be
6 heard on one point? May I just point out to the
7 Court that there is no operative noun in that
8 phrase, that is, it's not clear who is the one
9 saying this; in other words, whether I said to
10 him, "Come on back," or he said to me he would
11 come back. Just that phrase, "Say come back."
12 It could be anybody saying that they would or
13 should.

14 That might be, Judge. Mr. DiBartolo's
15 comment that was just alluded to has to be read
16 in the light of the one immediately preceding
17 it in which your Honor questioned him as follows,
18 same page:

19 "THE COURT: And that you got from him
20 by giving him only part of what the check said
21 it was for?

22 "MR. DiBARTOLO:" --

23 THE COURT: If you want to do that, go
24 back one question further still.

25 MR. SONENSHINE: "THE COURT: You got the

1
2 check from a person you knew was Daniel Carpo-
3 neta?

4 "MR. DiBARTOLO: Yes, because he left the
5 check and not all the money given to him."

6 THE COURT: Let's pause on that and re-
7 flect on that for a minute.

8 "You got the check from a person whom
9 you knew was not Daniel Carponeta?

10 "Answer: Yes. Because he left the check
11 and not all the money given to him."

12 MR. SONENSHINE: Then you read the next
13 question, if I may, your Honor:

14 "THE COURT: And that you got from him
15 by giving him only part of what the check said
16 it was for?

17 "MR. DiBARTOLO: Supposed to come back.
18 The man never showed up for the rest."

19 Apparently again, of course, we're dealing
20 with a man who concededly is not necessarily
21 using English words the way we do.

22 THE COURT: Next question: "You knew he
23 wasn't going to come back; is that right?

24 "MR. DiBARTOLO: Say come back; never
25 come back."

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2 MR. SONENSHINE: In the previous state-
3 ment he indicated the man was supposed to come
4 back.

5 THE COURT: "And then you put the check
6 through?

7 "Yes."

8 MR. SONENSHINE: The question then comes
9 down to this: We have Mr. Tomaselli acting in
10 the capacity of his interpreter and I have no
11 doubt whatever that Mr. Tomaselli, whatever
12 he told the Court, was what he literally under-
13 stood to be so. The question that the Court
14 has to contend with is whether or not Mr. Thomas-
15 elli might have been mistaken himself because
16 of the vagaries of the Italian dialect. I want
17 to develop that to some extent.

18 The best indication of it is his saying
19 to you, and I read it the same way as you heard
20 it and as you now read it, page 5, that it appears
21 from Mr. Tomaselli's recitation that the defend-
22 ant has said to Mr. Tomaselli, "Sure I got the
23 check. I knew he wasn't coming back." The
24 inference immediately to anyone who's trained in
25 the English language is that the two events

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2 occurred simultaneously in point of time. He
3 received the check with knowledge that he knew
4 the man was not going to return for the balance
5 of the money. Yet, Mr. DiBartolo's own state-
6 ment, and he has no motivation at this point
7 to say anything one way or the other, on page 9,
8 Mr. DiBartolo makes it quite clear that he took
9 the check from a man to whom he only gave part
10 of the money; that the man was supposed to come
11 back for the rest. Those are almost his exact
12 words to your Honor, and he never showed up for
13 the rest.

14 Then it becomes evident that Mr. DiBartolo
15 may have been in a situation where he gave money
16 to a man, the man doesn't show up, and now he
17 comes to the conclusion with ultimate accuracy
18 that something was wrong with that check. Why
19 wouldn't the man come back for his money if the
20 check was legitimate, unless he got hurt some-
21 where, and maybe it didn't pay for him to borrow,
22 whatever the motivation may have been. What
23 Mr. DiBartolo is saying is "That's when I con-
24 cluded that there was something wrong with this
25 check."

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2 This is what I think the problem was on
3 the taking of the plea. I want to put the ques-
4 tion to Mr. Tomaselli.

5 Q Within the confines of the Italian dialect
6 as you understand it, are such shadings of misinterpre-
7 tation possible in terms of the tense or the time when
8 an event actually occurred to pinpoint it?

9 A Yes, the dialect is a peasant dialect.
10 It's not grammatically accurate, so you always have
11 different shadings.

12 MR. SONENSHINE: That concludes my
13 direct examination, Mr. Tomaselli.

14 CROSS EXAMINATION

15 BY MR. PATTISON:

16 Q Sir, could you tell us, please, for how
17 long prior to this plea had you known Mr. DiBartolo?

18 A Seven to eight years.

19 THE COURT: Seven to eight years?

20 THE WITNESS: Yes.

21 Q Had you represented him on any other
22 prior occasions?

23 A Yes.

24 Q Criminal cases?

25 A Yes.

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Q Civil cases?

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A Yes.

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Q Could you please explain what type of cases these were and what type of dealings he actually had with you?

7

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MR. SONENSHINE: May I object as irrelevant, if the Court please.

9

THE COURT: To what, sir?

10

11

MR. SONENSHINE: Irrelevant as to what the previous cases were about.

12

13

THE COURT: In the circumstances, I think we have to go a little bit at large.

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A I represented him approximately three or four times with various closings of houses. I represented him when he was purchasing, I believe, four different businesses, and I represented him for criminal possession of stolen property and another criminal matter which was brought at the same time. That's about all.

21

22

23

Q O.K. What language did you talk to him in when you would meet him, discuss these various matters?

24

A English and Sicilian.

25

Q Did he understand English?

1
2 A To a certain extent, yes.

3 Q To what extent?

4 Could you characterize it as adequate, as
5 less than adequate --

6 A Well, it all depends who's doing the inter-
7 preting. I would qualify it or I would state that it was
8 adequate but I just would like to state this: I have
9 dealt with many, many Sicilian people before and when
10 they say certain words and certain phrases I understand
11 what they mean because of just the background of it.
12 You know, and perhaps another individual may not.

13 Q Let me ask you this, sir: What type of
14 work had he done for at least the seven or eight years
15 that you knew him?

16 A He was a butcher. He owned a pizzeria.
17 He owned a laundromat. That's about it.

18 Q These were -- this was the type of business
19 in which he would be called upon to deal with various
20 persons coming into a shop, public, that is?

21 A I would presume so.

22 Q Where were these? Were these in what
23 areas, sir?

24 A I think it would be basically Brooklyn
25 and Queens, Ozone Park, as far as Queens was concerned,

1
2 and certain portions of Woodhaven and Jamaica.

3 Q Were these areas wherein -- pardon me.
4 Withdrawn.

5 Were these areas strictly non-English
6 speaking areas?

7 A I don't understand the question.

8 THE COURT: Were these shops of his located
9 in areas where his clientele would be all
10 Italian-speaking or Sicilian?

11 THE WITNESS: No, not necessarily, no. No.
12 In fact, I would say no.

13 Q So he would deal with English-speaking
14 persons in the course of his work?

15 A I would presume so, but I have never seen
16 him deal with any individual in the course of his work.

17 Q When you had said earlier, sir, I believe,
18 that you did not translate exactly word for word,
19 literally, what he said to you and what the English of
20 the court was --

21 A That's correct.

22 Q Is that right?

23 A That's correct.

24 Q Would it be fair to say, sir, that you were
25 translating normally idiomatically?

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2 A Yes.

3 Q And isn't it fair to say that this is the
4 only way any language can be done, translated, that is?

5 A I don't know the answer to that.

6 Q Virtually, that this is common, that this
7 is not out of the ordinary?

8 MR. SONENSHINE: Objection, speculative.

9 The witness is not qualified to make such a
10 determination or enter such an opinion.

11 THE COURT: He could be asked to answer
12 a question addressed to whether or not he could
13 say he had confidence that he was translating
14 faithfully the true sense of what he heard.

15 Q Would the Court's statement be accurate,
16 sir?

17 A Yes.

18 Q You were not changing the meaning of
19 anything?

20 A No.

21 Q Now, prior to this plea being entered you
22 had talked with him on the facts involved in this case,
23 hadn't you, sir?

24 A That's correct.

25 Q Now when during the course of the plea

1
2 your client stated through you that he knew the man from
3 whom he had obtained the check wouldn't be back, was this
4 something different than what you had learned prior from
5 him?

6 A No.

7 Q Was it your impression, sir, at the time
8 that you translated what he said that he understood at
9 the time he accepted the check that the man would never
10 be back for his change, or was it your impression
11 from your prior meeting with your client that he later
12 learned that the man did not in fact come back for his
13 change?

14 A I would have to say it would be my impres-
15 sion that I thought he knew the individual was not
16 coming back for his change.

17 Q Right at the moment the check changed hands,
18 at that time and not days later when he did not come back?

19 MR. SONENSHINE: Objection as to his
20 opinion on what the ultimate fact was in the case.

21 A Only what he related to me at the point of
22 time when he related to me. In other words, I had spoken
23 to him several moments after this transaction and at
24 that particular time he had knowledge that this indi-
25 vidual wasn't coming back. When he spoke to me, he
spoke to me and indicated to me at that particular time

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2 that the man was not coming back and I presume, and
3 I still would stand on that particular statement
4 that it's my opinion that he was of the belief that
5 this man was not coming back at all.

6 In other words, he was giving him a
7 portion of the money and he wasn't coming back. As to
8 a point of time, I can't be sure.

9 Q Let me just go to the court minutes
10 again, sir. On the motion papers which you have there,
11 sir, before you, page 3, which I believe would be --
12 I'm not certain --

13 MR. PATTISON: I do not have a copy of
14 the actual minutes. I have the motion paper,
15 copies. That would be page 3 also of the offi-
16 cial court minutes.

17 Q Without reading it all, sir, you can see
18 the Court begins by saying,

19 "Before I accept the plea of guilty,
20 I want to make sure..." et cetra. The Court
21 outlines the charge; is that right?

22 A Yes.

23 Q Now, the next person speaking is who, sir?

24 A Mr. DiBartolo.

25 Q Did you translate for him there?

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2 THE COURT: Maybe we ought to be clear,
3 that we all are clear what this transcript means.
4 Whenever Mr. DiBartolo spoke in English, Mr.
5 LeGendre took down what he said. Now, whatever
6 Mr. Tomaselli spoke in English, Mr. LeGendre took
7 down what Mr. Tomaselli says.

8 MR. PATTISON: Yes.

9 THE COURT: In each instance put the
10 proper name tag next to him.

11 When Mr. Tomaselli and Mr. DiBartolo
12 spoke in Sicilian or Italian, it was not taken
13 down and while there was no particular effort to
14 make it a secret talk because I don't think
15 either of you assumed there were any Sicilian-
16 speaking people around, they talked to each other
17 with their heads not directed toward Mr. LeGendre,
18 so he did not take any of that down phonetically
19 or in any other way.

20 MR. PATTISON: That is my understanding of
21 what happened.

22 Q You did not translate this entire plea
23 for him, did you?

24 A No.

25 Q There were certain portions where the

1
2 Court spoke with him and he answered directly without
3 any third party?

4 A That's correct.

5 Q This first instance would be one of those
6 instances, is that right?

7 A That's correct.

8 Q Wherein he said to the Court, "I understand
9 what you say. I don't say I stole it or not."

10 Sir, at that time was there anything about
11 that statement which you felt was less than lucid or
12 which indicated that he did not understand what the
13 Court had said to him?

14 A No.

15 Q As a matter of fact, would it be fair to
16 say that that was a very important practical point to
17 get across to the Court in light of what the Court had
18 to say to him?

19 A Yes.

20 Q The fact that he was not the actual thief?

21 A That's correct.

22 MR. SONENSHINE: I'm sorry, that he was
23 not what?

24 THE COURT: That he was not the thief.

25 In other words, as I understand it,

1
2 Mr. Pattison's question, in other words, this was
3 a very intelligent response to the reading of the
4 indictment and the explanation of it. "I under-
5 stand what you're saying. But let's both be
6 clear. I was not the thief."

7 THE WITNESS: That's correct.

8 Q On page 4 of the minutes, which I believe
9 you indicate to the Court, "I just reiterated" --

10 MR. PATTISON: Your Honor, it's on page 3,
11 the lower part of page 3. It starts on the
12 motion papers.

13 MR. SONENSHINE: I pointed out to Mr.
14 Pattison, I annexed a copy of the motion papers
15 with it.

16 MR. PATTISON: I have it now.

17 Q Sir, you say there at the -- on page 4, you
18 say to the Court: "He knew the check wasn't one hundred
19 percent good. This is his words to me."

20 A That's correct.

21 Q Now, would that be -- would that possibly
22 contradict anything that he had said to you earlier
23 concerning when he realized the check was not one hundred
24 percent good?

25 A No.

1
2 Q And this meant that he knew it was not one
3 hundred percent good when it was handed to him or at
4 that time?

5 A That was my interpretation.

6 Q As opposed to his learning that it was not
7 one hundred percent good from the fact that the man did
8 not come back for any change?

9 A No, my interpretation was that he knew
10 that it was not one hundred percent good.

11 Q Then the next intercourse was again between
12 your client and the Court directly.

13 A Yes.

14 Q Without you translating, is that right?

15 A Yes.

16 Q The Court stated to your client, "You knew
17 that the man who gave it to you wasn't Mr. Carponeta?"

18 Then you say, "Tell the Judge."

19 Your client says, "Yes."

20 Right? There wasn't any language barrier
21 there, apparently?

22 A No.

23 Q There is further colloquy between your
24 client and the Court. You did not translate the next
25 question, and the next and on page 4, did you, sir?

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A No.

Q As a matter of fact, would it be fair to say, sir, that the only times that you did translate for him were where the record indicates that it's you speaking?

A That's correct.

Q Sir, have you seen your former client's affidavit in this case?

A Yes.

Q The instant motion paper?

A Yes.

Q I direct your attention, sir, page 2, approximately the middle of the page, the sentence, "I thought that my possession alone was sufficient to bring about a conviction."

A Yes, I see that.

Q Sir, at the time of the plea being entered, was it your understanding that that was your client's opinion at that time, that is, that he thought that he could go to jail and was in fact guilty of a crime merely because he had the check?

A No.

THE COURT: You never told him that?

THE WITNESS: No.

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2 Q Was there anything that he ever said to you
3 or that you said to him which could have led him to think
4 that?

5 MR. SONENSHINE: Objection, if the Court
6 please. I object, if the Court please, as calling
7 for a conclusion on his part as to what was in the
8 defendant's mind.

9 THE COURT: No, I think maybe if you
10 sharpened up the question.

11 MR. PATTISON: Very well, your Honor, I'll
12 try.

13 THE COURT: Because otherwise, as Mr. Son-
14 enshine says, you're asking him an awful broad
15 one.

16 Q Did your client prior to the time of the
17 plea or at the time of the plea say anything to you con-
18 sistent with the present allegation, that is, that he
19 thought merely having the check was enough for him to go
20 to jail, and be in fact guilty of a crime?

21 A No.

22 MR. PATTISON: Thank you.

23 I have no further questions, your Honor.

24 REDIRECT EXAMINATION

25 BY MR. SONENSHINE:

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2 Q Mr. Tomaselli, I think you indicated to
3 the Court that so far as you were concerned, the trans-
4 lation which you placed upon the record of what Mr. Di-
5 Bartolo had said to you was so far as you could tell
6 accurate.

7 A Correct.

8 Q Now, let me ask you this: Do you recall
9 the questions that you put to Mr. DiBartolo or what you
10 said to him that elicited the answers that you repeated
11 to the Court?

12 A Some of them.

13 Q Are you able to recall them verbatim?

14 A No.

15 Q Is it possible that in the light of
16 answers that Mr. DiBartolo gave with respect to when he
17 acquired this knowledge, and your prior statement to
18 the Court as to what you thought Mr. DiBartolo had said
19 to you about when he acquired the knowledge, is it pos-
20 sible that it was your question that he might have mis-
21 interpreted?

22 A Mr. DiBartolo never stated to me when he
23 acquired the knowledge.

24 Q So that --

25 THE COURT: When he acquired?

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2 THE WITNESS: The knowledge that, No. 1,
3 when this individual, when he knew that this
4 individual was not coming back. No. 2, when he
5 knew that the check was not one hundred percent
6 bona fide. He never stated a point of time to
7 me when he acquired that knowledge.

8 Q Do I understand correctly it never zeroed
9 in, so to speak, on that point with you and Mr. DiBartolo?

10 A Never. Whenever we spoke, we spoke in the
11 past tense; that it happened and that he knew it and
12 that was it.

13 Q Is it fair to say then when Mr. DiBartolo
14 said to you, "I knew the check was stolen," he was tell-
15 ing you this at a point --

16 A He never said that to me.

17 Q That "I knew the man wasn't coming back,"
18 let me rephrase the question.

19 The possession of the check was charged in
20 the indictment to have occurred on or about March 12,
21 1970. I take it that the first time you ever spoke to
22 Mr. DiBartolo with respect to the facts of the case was
23 long after March 12th, 1970.

24 A That's correct.

25 Q So that every time he said to you, "I knew

1
2 the man wasn't coming back," he was speaking at a time
3 long beyond March of 1970?

4 A That's correct.

5 Q So that when he said he knew the man wasn't
6 coming back, whether he knew that on March 12th or March
7 28th or at two in the afternoon or ten at night, was
8 never a subject of your discussion?

9 A Never.

10 MR. SONENSHINE: I have no further
11 questions, your Honor. Just one.

12 Q When was the first time you actually dis-
13 cussed the events surrounding the check with Mr.
14 DiBartolo?

15 A I don't know the exact date, but it was
16 at a time -- First of all, we didn't discuss this par-
17 ticular check at any particular time. We discussed this
18 check, basically, the day that he was to take his plea,
19 just prior thereto. I had spoken to Mr. DiBartolo on
20 several occasions and I had represented him in a prior
21 proceeding in the federal court which was dismissed based
22 on these particular checks and thereafter he was indicted.

23 Q So that, in any event, the very first time
24 these checks ever came to your attention or the subject
25 matter of the indictment came to your attention was long

after March 27th, 1970?

A Yes, it was.

Q At least many months, is that a fair estimate?

A Yes.

MR. SONENSHINE: Thank you.

MR. PATTISON: I have one other question.

REXCROSS EXAMINATION

BY MR. PATTISON:

Q Did your client tell you where this incident occurred?

A What incident?

Q This was at his store?

MR. SONENSHINE: I object to these questions as being totally irrelevant. It's going into the area of privilege.

MR. PATTISON: I would say the area of privilege was waived quite a while ago.

THE COURT: In this sort of situation.

MR. SONENSHINE: I understand, your Honor, there's a certain amount of waiver here. What I'm saying, the question which Mr. Pattison puts doesn't relate to the issue he is now going into areas of privilege, aside from the fact the

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2 question is irrelevant. I'm raising both grounds
3 if I may.

4 MR. PATTISON: The question hasn't actually
5 been asked, the entire question, hasn't.

6 THE COURT: I don't know what the question
7 is at the moment.

8 Q Is it not a fact, sir --

9 THE COURT: Was there a discovery in this
10 action?

11 MR. PATTISON: Yes, there has been,
12 I believe, your Honor.

13 THE COURT: Did Miss O'Brien make dis-
14 covery of the checks to you?

15 THE WITNESS: Yes.

16 Q Did you talk about these checks with your
17 client?

18 A Yes.

19 Q Where did your client cash this check --
20 partially cash the check involved in Count No. 7?

21 MR. SONENSHEIN: Objection, if the
22 Court please. I object to that, firstly, it's
23 irrelevant. Secondly, it calls for hearsay as
24 to where he thinks the defendant cashed the
25 check.

THE COURT: No, he's asking where the

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2 defendant said he cashed the check. Your point
3 there is that that's privileged.

4 MR. SONENSHINE: It certainly is. It's
5 beyond the scope of this proceeding.

6 THE COURT: Do you think the privilege
7 can possibly survive the affidavit and the stand-
8 ing on the motion?

9 MR. PATTISON: Innocuous enough question
10 anyway, your Honor. I believe once he admits
11 cashing the check, which he has in court on the
12 record, I think where it happened will not sub-
13 ject him to any further punishment or any other
14 harm.

15 MR. SONENSHINE: I would ask Mr. Pattison
16 to state what he believes the relevancy to be --

17 THE COURT: I'm sorry?

18 MR. SONENSHINE: I would ask Mr. Pattison
19 to state what he believes the relevancy as to
20 where the check was cashed has to the issue here
21 as to what took place at the time of the plea,
22 the defendant who interpreted the plea and
23 Mr. Tomaselli who acted as the interpreter at
24 the time of the plea.

25 MR. PATTISON: Your Honor, we have the

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2 right to show there were other facts inherent
3 with the cashing of this check, from which he
4 could or should have realized that there was
5 something wrong with this check consistent with
6 what he said at the time of the plea, that he
7 knew there was something wrong.

8 THE COURT: I don't think it makes a
9 difference one way or the other. Rather than run
10 the risk of having the proceeding upset on the
11 privilege point, the objection will be sustained.

12 MR. PATTISON: Very well, your Honor.

13 Q At the time of this incident, sir, the
14 check cashing incident, where was your client's store at
15 that time? What was the address of the store?

16 A He had several stores at that particular
17 time.

18 Q Butcher shop, I believe.

19 A I believe he had a grocery store and a
20 butcher shop, two separate enterprises.

21 Q Where were they, sir, do you recollect?

22 A One was on Jamaica Avenue, which was a
23 butcher store. The other one, the grocery store,
24 I don't remember. It may have been on Jamaica Avenue.
25 It may have been on Sutter Avenue. I really don't know.

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Q Relatively close to each other?

A Within the same borough.

Q Well, that would be --

A Within a radius of a mile.

Q That wasn't anywhere near -- Would you know how far away that would be from 8-39 216th Street, New Hyde Park, New York?

A I would estimate perhaps anywhere between ten and twelve miles.

Q That was the address on this check which is referred to in Count No. 7; is that right?

A I believe so.

Q Which I would now hand you, sir (handing to witness).

MR. PATTISON: I would ask it be marked.

A That's the address on this.

Q Daniel Carponeta's U.S. Treasury check mailed to his home.

A That's what it says.

THE COURT: What's the date of the check?

MR. PATTISON: March 12, 1970.

Q The stores owned and also operated by your client, approximately how large were they?

A They were usual --

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2 Q Physically, I mean.

3 A Physically large?

4 Q Yes.

5 MR. SONENSHINE: I object to this as
6 being totally irrelevant, beyond the issues in
7 this case, and certainly nothing to do with my
8 redirect examination.

9 MR. PATTISON: Your Honor, may I be heard
10 on that?

11 THE COURT: Just a minute, if you will,
12 Mr. Pattison.

13 MR. SONENSHINE: May we have the record
14 read back to see what it is I objected to.

15 THE COURT: I'm just being asked if
16 I wouldn't mind issuing an oral temporary re-
17 straining order to prevent the United States
18 from putting one of its mandates into effect.
19 I thought perhaps I shouldn't do that.

20 MR. SONENSHINE: I have objected to the
21 question by Mr. Pattison as to the dimensions
22 of Mr. DiBartolo's store.

23 THE COURT: I think he wants to know
24 whether this was some vast supermarket stretching
25 over half an acre with fourteen clerks and all

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2 that, so that all poor Mr. DiBartolo was doing
3 was underwriting its loss.

4 Q Would this be fairly characterized, sir,
5 as a relatively small operation, neighborhood business
6 store?

7 A All the stores I have ever seen him in
8 were small neighborhood stores.

9 THE COURT: So-called mom-and-pop stores?

10 THE WITNESS: Yes.

11 Q With clientele generally coming from the
12 relatively close area?

13 A Yes.

14 Q Not ten or twelve miles away --

15 MR. SONENSHINE: Objection to that,
16 I don't know the scope of this witness's
17 information. The question calls for and elicits
18 a hearsay answer as to who the man's customers
19 were. There's no foundation laid.

20 THE COURT: He's told us it's a small
21 neighborhood store, not an A&P.

22 MR. PATTISON: Your Honor, I don't have
23 any other questions.

24 MR. SONENSHINE: No further questions,
25 your Honor.

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2 THE COURT: Mr. Tomaselli, thank you.

3 (Witness excused)

4 THE COURT: What do you suppose happened
5 to that man, Mr. Sonenshine?

6 MR. SONENSHINE: I would ask your Honor's
7 permission to call my office to find out.

8 THE COURT: Do you want to phone your
9 office? We can take a recess.

10 MR. SONENSHINE: I would like to to see
11 if information developed since I have been in the
12 courtroom.

13 MR. PATTISON: May I inform the Court we
14 intend to move, after the phone call, unless
15 some other facts come up, for a warrant -- not
16 for a warrant, but for the change in the stay
17 of execution of the actual sentence imposed by
18 the court, which was, I believe, extended.

19 THE COURT: Let's wait until Mr. Sonen-
20 shine makes the phone call.

21 MR. PATTISON: I wanted to inform you
22 of that.

23 (Recess)

24 MR. SONENSHINE: If your Honor please,
25 I telephoned my office. They have not heard from

1 Mr. DiBartolo. I'm not able to reach him.

2 I would most specifically request that
3 the hearing be deemed to be continued for what-
4 ever date your Honor wants to set, Monday or
5 Tuesday or any other date that's convenient for
6 you. I really don't understand why he's not here
7 but I'm inclined to believe there's probably
8 some explanation for it other than the fact he
9 just didn't want to come here. I don't believe
10 that. I just don't know what it is. Maybe it's
11 some failure of communication or maybe something
12 happened to him along the way. I have no way of
13 accounting for it at the moment.

14 MR. PATTISON: Your Honor, the Government
15 would not oppose that, that the hearing be put
16 over until Monday any time, but we would ask
17 that there is no reason at all now for the sen-
18 tence not to be actually executed.

19 THE COURT: I think --

20 MR. PATTISON: The sentence was imposed
21 back in April, back on April 26th, at which time
22 he asked for and the Court gave leave of a month,
23 which is quite a long enough time. That was up
24 to May 26th. Then this motion had the effect
25 of having the stay in effect continued longer.

1 I think that the hearing can be held and
2 he could be writted in from wherever he is, at
3 West Street, I would assume, where he'll stay for
4 a short while until he's assigned a particular
5 prison and it's the only way, I think, that we
6 can ever get this over with, and there is no
7 reason not to.

8 MR. SONENSHINE: May I be heard on that,
9 your Honor?

10 THE COURT: Yes.

11 MR. SONENSHINE: Your Honor had previously
12 stayed the execution of the sentence until
13 June 24th and undoubtedly, I must assume my
14 client in making whatever arrangements he was
15 making, contingent upon whichever way the hear-
16 ing went, if it were denied and he had to surren-
17 der himself, he may have made perfectly good
18 faith arrangements with the position of his
19 personal affairs, his business, in view of the
20 date of the 24th. I would most specifically
21 ask your Honor do not at least at this point
22 disturb that arrangement. It may be the defend-
23 ant is involved in some accident or became ill.
24 I don't know. It's not his fault at all. The
25 result may be that he may be inadvertently, be

1 penalized very severely by any alteration at
2 this time in the date of surrender. I don't
3 know -- I have never questioned him about dis-
4 posing, about the business arrangements, what he's
5 doing about it. He may have made arrangements
6 to do this on the 18th and this on the 22nd.
7 I don't know. There may be all sorts of liabili-
8 ties that will accrue as a result. I would most
9 specifically ask --

10 THE COURT: I'm going to treat
11 this hearing, that Mr. Pattison has evidence
12 to present -- to treat this hearing as closed,
13 subject to being reopened if he comes forward
14 with some good explanation of why it should be
15 reopened.

16 MR. SONENSHINE: That's reasonable enough.
17 I ask your Honor not disturb the stay arrange-
18 ments at this time. I must tell your Honor --

19 THE COURT: If the FBI has reason to
20 believe he has decamped, the stay is certainly
21 to be canceled. I see no reason to do it any
22 other way.

23 MR. SONENSHINE: That will become evident
24 in any manner, your Honor.

25 THE COURT: What disturbs me, Mr. Sonenshine,

1 is that you can't get in touch with him.

2 MR. SONENSHINE: It's not a problem of
3 my not being able to get in touch with him. I'm
4 in the courtroom now. I called my office to find
5 out if he had called. He had not. It's a ques-
6 tion of my getting back there and tracking him
7 down. I don't mean that I have no way to find
8 him. I meant it's physically impossible from a
9 phone booth in the corridor to start tracking
10 him down.

11 MR. PATTISON: Your Honor, I believe you
12 have his own or what was told to you was his own
13 home phone number by Mr. Tomaselli.

14 MR. SONENSHINE: Mr. Tomaselli gave me a
15 number, provided. This is an old number.
16 I called and they didn't know anybody by that
17 name. Mr. Tomaselli supplied me a number on the
18 spur of the moment. They didn't have anybody
19 there by the name of DiBartolo.

20 The sensible thing for me to do is obvious-
21 ly go back to my office and start looking around
22 to see if I can locate him. I'm sure I can.

23 THE COURT: He'll have to take his
24 chances. If I haven't got any time between now
25 and the 24th, the sentence is executed, except

1 on the evidence or basis thus far, there is a
2 ground for setting it aside. I frankly don't
3 see one. Perhaps you do.

4 MR. SONENSHINE: It's my motion, your
5 Honor, that the key question with respect to his
6 plea, since the plea involves basically two
7 elements, one, possession of the check, and
8 second, knowledge that it was stolen.

9 THE COURT: We forget this was seven or
10 eight or nine count indictment and that there
11 were three March 27th checks, at least, and
12 perhaps four March 27th checks, not one, and
13 there were three or four different payees, not
14 just one. Then the man comes in and pleads on
15 one count and in addition to that there were
16 another smaller group of May counts. He pleaded
17 to one count of the indictment. I think as
18 I recall there were two counts addressed to each
19 of the March 12th checks.

20 All right, then one pair involved the
21 Pagan person, which may be in a different some-
22 what related transaction. I don't know anything
23 about that. That's what we're talking about.

24 We're not talking about any question of
25 the perfectly ordinary situation in which a cus-

1 tomer wanders in and tenders a check in payment
2 of a meat bill or something that happens not
3 to be payable to the order of the customer, but
4 bears a couple of endorsements on the back.
5 We're not talking about anything like that at all,
6 nor are we talking about a case in which par
7 value was paid for the check or face value less
8 ten cents or ten percent or any other charge, but
9 the man made it perfectly clear that what he had
10 done was to get the check, one of three, and to
11 pay less than the full value for it, so much less
12 that either the game or the statement was that
13 the man would be coming back for the rest and he
14 never did.

15 The check, as we learned today, dated on
16 the very day of the transaction, and I would not
17 assume that a storekeeper in this borough or the
18 adjacent borough of Queens, at least the more
19 westerly portions of it, would have to have a
20 house fall on him to realize that if he got two
21 or three March 27th checks tendered to him on
22 the same day by the same person that something
23 was very, very rotten indeed in the state of
24 Denmark. That's what we're talking about, and
25 it was perfectly plain that Mr. DiBartolo was

1 one of those fellows who was not going to make
2 any damning admissions here in court if he didn't
3 have to.

4 MR. SONENSHINE: I don't know. He pleaded
5 guilty anyway, Judge.

6 THE COURT: It was going to be very clear
7 that he was not the thief and that nobody ever
8 actually said, "My dear Mr. DiBartolo, would
9 you please purchase these stolen checks from me,"
10 knowing that they have been (a) stolen, and (b)
11 stolen from the U.S. mails.

12 That was perfectly clear, and I certainly
13 at the time derived the very clear impression
14 that not one word that went on here in court was
15 missed by Mr. DiBartolo. He knew what was going
16 on here and meant to preserve as much position
17 and face as he could.

18 MR. SONENSHINE: The only request that
19 I am really making, Judge --

20 THE COURT: I think there is a question
21 here as to whether he was entitled to have a
22 sworn court interpreter. That's the only question
23 I see. In other words, legal error for me to
24 permit him to take the plea where he was making
25 a pretext of not understanding English with the

1 use of his own lawyer as interpreter without
2 any swearing of the lawyer as an interpreter.

3 MR. SONENSHINE: I suppose that's a good
4 question for appeal. I am at the moment con-
5 cerned with what to do with the state of execu-
6 tion. Frankly, assuming for the moment that
7 I learn between now and Monday, let us say, that
8 there's some reasonably valid explanation, per-
9 fectly valid, whatever it may be, for his not
10 having been here today --

11 THE COURT: Look, Mr. Sonenshine, if we
12 find out that he's in the hospital somewhere
13 having his appendix taken out or something of
14 that sort, you know very well we're not going
15 to put him in jail for not having been here.

16 MR. SONENSHINE: I don't think you really
17 would, your Honor. What I'm concerned about is
18 that he may have made commitments and arrangements
19 based on the surrender date of the 24th.

20 THE COURT: That's certainly all right.
21 That's when he's going to surrender.

22 MR. SONENSHINE: All right.

23 THE COURT: I have not accelerated his
24 surrender date. All I'm saying is that unless
25 I hear something more I treat the hearing as

1 closed and I'm intimating to you that in the
2 absence of some indication that it was legal error
3 to proceed as I did without any sworn independent
4 interpreter, that I could not find any fair ground
5 to say that he didn't know what he was doing and
6 that that's the way the plea was obtained.

7 MR. SONENSHINE: I must say one thing.
8 I have a feeling I may have said it to you before.
9 If I haven't, it bears saying the first time.
10 I must say to your Honor one thing. I think
11 I may have said what I'm about to say before
12 to you, but if I haven't then I should have, that
13 is I have never yet seen your Honor in any way
14 afraid to look a legal issue squarely in the eye,
15 so to speak. I think you have probably -- well,
16 what I'm trying to say, Judge, is that I don't
17 think you're ever faced by any legal issue in
18 a case, whatever it is, be it good, bad, or
19 indifferent --

20 THE COURT: If he's entitled to get his
21 plea back, he'll get it back, don't worry. He's
22 not going to get it back if he's not entitled
23 to it.

24 MR. SONENSHINE: In all events, I know
25 you have another hearing scheduled at 4:30, ten

1 minutes from now. I won't delay the proceedings
2 any further. I would only ask your Honor's permis-
3 sion that if he should come to me and say that he
4 wants to appeal the issue, for permission to make
5 an application before you for bail pending appeal
6 at that time based upon whatever the circumstances
7 may warrant.

8 THE COURT: That's perfectly all right.

9 MR. PATTISON: Your Honor, under --

10 THE COURT: We're not up to that bridge.

11 MR. PATTISON: I'm at the very bridge now.
12 That is, that the man was to have been here to --
13 Now, today. He has not appeared. If he has
14 left -- if he has planned to and did in fact
15 flee --

16 THE COURT: Then he's in deep trouble.

17 MR. SONENSHINE: It's rather academic.

18 MR. PATTISON: He's in deeper trouble now
19 that he will be apt to be found now than he will
20 two weeks when the trail is colder. Might there
21 be some way wherein --

22 THE COURT: If you find out through inves-
23 tigation that he's decamped, let me know and the
24 stay will certainly come to an abrupt end and a
25 warrant for his apprehension issue forthwith.

1 MR. SONENSHINE: Have a good weekend.

2 Thank you so much.

3 THE COURT: Mr. Sonenshine will not object
4 at that point.

5 MR. SONENSHINE: I may not be in a
6 position to, I don't know.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

71 CR 1364

-against-

MEMORANDUM AND
ORDER

VITO JACK DI BARTOLO,

Defendant.

The evidence of Mr. Tomaselli at the hearing and the transcript of the plea taking established that defendant understood the nature of the charge, that his guilt depended on the existence of evidence that he knew that the check had been stolen, that he did have the knowledge but wished to avoid making an unrestricted admission of that knowledge and that he, rather, insisted on limiting the record to admission of the evidentiary basis of his guilty knowledge. Defendant, was, manifestly, astute enough to realize that, since he was charged only with guilty possession, he could not be supposed to have observed or participated in the actual theft, and that he could, therefore, for semantic purposes, deny that he "knew" - in the most ultimate and primary sense of that word - that the check was stolen. He rather, confined himself to admitting the full legal equivalent of that "knowledge". The language difficulty, not altogether absent, did not impair the facility and completeness of the defendant's grasp of the plea events, and the supposed failure accurately to translate in and out of the Sicilian dialect did not exist. Defendant and his counsel, Mr. Tomaselli, were far from strangers: Mr.

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Tomaselli had been defendant's counsel in several civil matters and in at least one earlier criminal matter, and he had known defendant for seven or eight years at the time of the plea-taking.

It is, accordingly,

ORDERED that the motion to set aside the judgment of conviction and to permit defendant to withdraw his plea of guilty is in all respects denied.

Brooklyn, New York

June 21, 1974.

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J.